

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

11 CARLOS SANCHEZ,) No. CV 06-04214-VBK
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 JO ANNE B. BARNHART,) AND ORDER
Commissioner of Social)
Security,) (Social Security Case)
16 Defendant.)

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and certified Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR. After reviewing the matter, the Court concludes that the decision of the Commissioner must be reversed and the matter remanded for further hearing.

1 It is undisputed that Plaintiff suffers from fibromyalgia.
2 Plaintiff seeks an award of benefits, or a remand, asserting, first,
3 that the Administrative Law Judge ("ALJ") failed to consider non-
4 exertional limitations and instead applied Medical-Vocational Rule
5 203.29 ("Grids"), and second, asserting inadequate reasons were
6 provided in the decision for depreciating Plaintiff's credibility as
7 to his pain and other subjective symptoms.

8 For reasons to be stated, the Court concludes that error was
9 committed, and the matter must be remanded for further hearing.

10 At Step Two of the sequential evaluation process, the ALJ found
11 that Plaintiff suffers from severe fibromyalgia. (AR 21, Finding 2.)
12 Discounting as "not totally credible" Plaintiff's allegations
13 regarding his non-exertional impairments (primarily pain, fatigue and
14 related limitations), the ALJ assessed a residual functional capacity
15 ("RFC") for medium work, without factoring any non-exertional
16 limitations. (AR 22, Finding 5.) The ALJ applied the Grids as a
17 guideline for decisionmaking and found Plaintiff to be not disabled.
18 (*Id.*, Finding 4.)

19 The definition of a "severe" impairment, although well
20 understood, bears repeating, especially in the context of an
21 impairment such as fibromyalgia.

22 A severe impairment or combination of impairments is one which
23 significantly limits the physical or mental ability to perform basic
24 work activities. 20 C.F.R. §416.920. Basic work activities relate to
25 the aptitudes necessary to perform most jobs, such as the ability to
26 perform physical functions, the capacity for seeing and hearing, and
27 the ability to use judgment, respond to supervisors, and deal with
28 changes in the work setting. 20 C.F.R. §416.921; Bowen v. Yuckert,

1 || 482 U.S. 137, 141-42 (1987).

2 Plaintiff is not required to establish total disability at this
3 level of the evaluation. Rather, the severe impairment requirement is
4 a threshold element which plaintiff must prove in order to establish
5 disability within the meaning of the Act. Id. at 146. "The severity
6 requirement increases the efficiency and reliability of the evaluation
7 process by identifying at an early stage those claimants whose medical
8 impairments are so slight that it is unlikely they would be found to
9 be disabled even if their age, education, and experience were taken
10 into account." Id. at 153.

11 Pursuant to Social Security Ruling 85-28,

12 "An impairment or combination of impairments is found
13 'non-severe' and a finding of 'not disabled' is made at this
14 Step when medical evidence establishes only a slight
15 abnormality or a combination of slight abnormalities which
16 would have no more than a minimal effect on an individual's
17 ability to work even if the individual's age, education, or
18 work experience were specifically considered (*i.e.*, the
19 person's impairment(s) has no more than a minimal effect on
20 his or her physical or mental ability(ies) to perform basic
21 work activities)."

22
23 In this case, the ALJ took pains to note the classic symptoms of
24 fibromyalgia. (AR 19.) Still, he concluded that Plaintiff suffered at
25 most mild non-exertional impairments, thereby permitting application
26 of the Grids to establish non-disability.

27 In its opinion in Benecke v. Barnhart, 379 F.3d 587 (9th Cir.
28 2004), the Ninth Circuit extensively reviewed the issue of

1 fibromyalgia in the Social Security context. The Court noted that
2 fibromyalgia has an unknown etiology, is incurable, and is poorly
3 understood within the medical community. The Opinion notes that, "The
4 disease is diagnosed entirely on the basis of patients' reports of
5 pain and other symptoms." (Id. at 590.) There are no laboratory tests
6 to confirm the diagnosis; rather, there is a set of agreed-upon
7 diagnostic criteria. (Id.)

8 The ALJ's decision makes substantial reference to reports of
9 Plaintiff's treating physician, Dr. Hollcraft. (AR 19, 116-219.) His
10 notes, which span a period of several years, reflect that Plaintiff
11 continuously complained of symptoms of classical fibromyalgia. (See AR
12 at 121, for example, reflecting Plaintiff's complaints to Dr.
13 Hollcraft in 2000 and 2002.) The ALJ interpreted Dr. Hollcraft's
14 notes as supporting a dramatic regression of fibromyalgia symptoms
15 from March 2002 to June 2002 (AR 19), but in support of this
16 conclusion cited a June 13, 2000 report of Dr. Hollcraft. (AR 130-
17 131.) The ALJ next stated that despite medical documentation showing
18 a dramatic regression of symptoms, "overall the record shows little
19 change from one visit to the next and good response to Amitriptyline."
20 (AR 19.) But, it is clear that Amitriptyline was prescribed only for
21 better sleep. (See AR at 130, 136.) The Court fails to find in Dr.
22 Hollcraft's records any indication that Amitriptyline ameliorates
23 classic symptoms of fibromyalgia. Further, the ALJ agreed with the
24 opinion of the State Agency physician that Plaintiff's complaints of
25 pain, stiffness and burning sensations, although symptomatic of early
26 fibromyalgia, were responsive to treatment. (AR 19, citing State
27 Agency physician report at AR 225-233.) The ALJ failed, however, to
28 identify specific references in the medical records where a physician

1 or other source opined that Plaintiff's fibromyalgia symptoms were in
2 fact generally responsive to treatment.

3 At the hearing, Plaintiff described his symptoms from
4 fibromyalgia, such as fatigue, pain, and burning, and his activities
5 of daily living. (AR 243-247.) If Plaintiff's testimony is to be
6 given credibility, then clearly he would be deemed to have non-
7 exertional impairments which must be factored into the disability
8 analysis. As such, application of the Grids would be impermissible in
9 order to find non-disability. See Lounsbury v. Barnhart, 468 F.3d
10 1111 (9th Cir. 2006). The ALJ, however, depreciated Plaintiff's
11 credibility, and the Court must examine whether sufficient reasons
12 were provided.

13 First, the ALJ asserted that Plaintiff "admitted" that Ibuprofen
14 and Amitriptyline controls inflammation. (AR 19, citing AR 246-247,
15 87.) The ALJ certainly misread Plaintiff's testimony. What Plaintiff
16 said, which Dr. Hollcraft corroborated, was that the Amitriptyline
17 helped him sleep, not that it controlled his inflammation. As to
18 Ibuprofen, Plaintiff stated, "That was just killing my stomach." (AR
19 246.) Nowhere did Plaintiff indicate that Ibuprofen controlled
20 inflammation, and in any event, the ALJ failed to address these
21 possible side effects from the medication.

22 As another reason for detracting from Plaintiff's credibility,
23 the ALJ asserted that he had made no sustained effort to seek
24 treatment at free public clinics. (AR 20.) This is another
25 unsupportable basis to detract from Plaintiff's credibility,
26 especially in view of the fact that there is no evidence that any
27 particular medication or treatment regularly assisted Plaintiff with
28 his pain or other symptoms. In any event, this was, legally, an

1 impermissible factor in the credibility determination. (See Penny v.
2 Sullivan, 2 F.3d 953, 958 (9th Cir. 1993) ("The ALJ discredited Penny's
3 testimony of existing pain because he did not seek medical
4 treatment... This fact does not in any way prove that Penny's
5 testimony concerning his pain at the time of his hearing was not
6 credible.").

7 The ALJ next cited Plaintiff's statements in fatigue
8 questionnaires as to his daily activities, noting that Plaintiff does
9 yoga, takes long walks in the neighborhood, cleans his room, helps
10 with household tasks and prepares simple meals. He also noted that
11 Plaintiff claimed he could walk a mile, stand up to two hours, and sit
12 up to three hours. (AR 20, citing AR 71-74, 75-80.) The problem with
13 this analysis is that the ALJ described the activities, but omitted
14 the limitations on those activities which Plaintiff carefully
15 explained in his pain questionnaires, completely overlooking
16 Plaintiff's clear and consistent statements that he must often rest
17 during these activities, and that sometimes he is incapable of doing
18 them because of pain.

19 Plaintiff's credibility was also depreciated, the ALJ noted,
20 because he lacked motivation by virtue of his failure to perform
21 recommended exercises. The ALJ cited Dr. Hollcraft's comment in a
22 February 27, 2002 report that Plaintiff has not been exercising on a
23 regular basis. (AR 20, 122.) There is an obvious contradiction here.
24 On the one hand, the ALJ detracted from Plaintiff's credibility
25 because he is capable of and in fact engages in activities of daily
26 living such as yoga, taking long walks, and the like, but on the other
27 hand found Plaintiff to be not credible because of his failure to
28 perform recommended exercises. Both cannot be true.

For these reasons, the Court finds that the ALJ's credibility analysis was faulty. See Reddick v. Chater, 133 F.3d 704, 722 (9th Cir. 1988). The factors set forth in 20 C.F.R. §416.929 (2006) were not properly evaluated. The ALJ's decision lacks specific, clear and convincing reasons to reject Plaintiff's pain allegations. See Thomas v. Barnhart, 278 F.3d 947, 959-60 (9th Cir. 2002).

The Court denies Plaintiff's request that his matter be remanded for calculation of benefits. It appears to the Court that a remand for a new hearing, and a proper evaluation of Plaintiff's non-exertional impairments and their impact on his RFC, is the appropriate course. See *Moigne v. Bowsher*, 367 F.3d 882, 886-87 (9th Cir. 2004).

Based on the foregoing, the decision of the ALJ is reversed and this matter is remanded for further proceedings.

IT IS SO ORDERED.

DATED: May 25, 2007

/s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE